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State responsibility

Comments and observations received from Governments

Addendum

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II. Comments and observations received from Governments

Singapore

[15 June 1998]

General remarks

1. As with previous documents presented by the Commission, these draft articles and commentaries, adopted on first reading at the forty-eighth session held from 6 May to 26 July 1996, joins the list of many international instruments that have contributed to the development and codification of international law. This document is without a doubt consistent with the well-deserved reputation of the distinguished jurists that constitute the Commission. This set of draft articles and commentaries on the international responsibility of States, is a laudable product of several decades of controversial, yet persistent, study and scrutinizing of principles *de lege ferenda* and *lex lata*. It is, perhaps, the identification – through the commentary of articles – that distinguish these two principles that highlights the excellence of the Commission's efforts. The commentary is most certainly an encouraging sign of the ongoing work of the Commission in this vital area of international law.

2. We will herein make a few brief comments and notes to this extensive and far-reaching document. These observations would no doubt already have been considered by the Commission, but are nevertheless raised to underscore the potential controversial implications that such principles might have if they were to be accepted without further discussion. Our comments, which are not exhaustive, would be directed at the following.

A. Identification of "an injured State" pursuant to Article 40

3. When and how a State becomes an injured State is vital in the allocation of certain privileges. The identification as an injured State gives that State a special status over a State that has committed an internationally wrongful act. This status, in turn, permits the injured State to claim remedies against the wrongdoing State and one of these remedies consists of acts that would otherwise be considered internationally wrongful acts, but are precluded from being wrongful as legitimate countermeasures. The process of identifying the injured State is consequently vital to legitimizing subsequent acts which would otherwise be wrongful. It is, perhaps, the most significant aspect of the Commission's work in the area of State responsibility.

4. From the commentaries to Article 40, it is clear that the Commission is aware that controversy exists with this identification process that bestows the status of "an injured State". In order for a State to claim to be an injured State under Article 40, the State would first have to show that the right alleged to be violated was a "primary" rule in international law and that they are parties bound by this primary rule. These are factors relevant in determining who is an injured State.[1]

5. Under Article 3, two elements need to be established for an internationally wrongful act of a State; namely, an act or omission attributable to the State under international law; and secondly, that conduct has to constitute a breach of an international obligation owed

[1] Para. 4, Commentary to Article 40.

by the offending State. The latter condition is considered by the Commission to be an objective element by reference to situations where the State "has failed, ... to fulfil an international obligation ...".[2] The Commission elaborated that the wrongfulness is constituted by a failure to observe conduct "... which *juridically* it ought to have observed ...".[3] The term "juridically", refers presumably to the term "juridical", which is defined as "relating to, or connected with the administration of law or judicial proceedings".[4] It is therefore suggested that the conduct to be observed must be a requirement in law and has to be established to be owed in law by the offending State.[5] The identification of this primary rule may be different between treaty and customary international law.

6. Where a multilateral treaty is concerned, States are patently aware of the provisions they are committing to when they accede to the treaty. They may, in some cases, make reservations or declarations concerning those provisions, but are essentially taken to be bound by the treaty as a whole – *pacta sunt servanda*. Other States may be injured due to the violations of some provisions depending on the relationship created by the treaty. For example, where reservations are made and accepted, the relationship as between reserving State and accepting State is modified and is certainly different from reserving State and objecting State. Where customary international law is concerned, States may be bound by a rule, whether or not they specifically consent to it. They may be bound on the basis of acquiescence[6] or because it is a norm by "their very nature" and "[i]n view of the importance of the rights involved ..." they create obligations owed to the international community.[7] Two conditions thus exist before a State may rely on customary international law. Firstly, it will be essential for that State to establish the requirements of acceptance as a norm of customary international law, that is, uniform State practice and *opinio juris sive necessitatis*,[8] and secondly, it must show a relationship or sufficient nexus between the violator and the State claiming status as an injured State sufficient to grant standing under Article 40.

7. Article 40 is an important provision for clarification of when a State would have the *locus standi* to bring an action claiming the remedies set out in Articles 41 to 46. It also provides the initial condition that must be satisfied before a State may take legitimate countermeasures against a wrongdoing State. This article should regulate the accord of standing with due respect to the two sources of international law.

B. Distinguishing convention mechanisms from customary international law measures

8. A corollary issue to the granting of standing under Article 40 is the difficulty of determining what mechanisms may be applied when particular provisions are violated. The choice of enforcement or dispute settlement procedures differ between treaty and customary international law. Treaty may provide one means specific to the treaty, whilst customary

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[2] Para. 1, Commentary to Article 3.

[3] Para. 7, Commentary to Article 3 (emphasis added).

[4] Oxford English Dictionary (vol. VIII, Clarendon Press, 2nd ed., 1989), at 320.

[5] This proposition would seem to be confirmed by the Commission in their commentary to Article 40(2)(e)(iii), para. 22, Commentary to Article 40.

[6] Where the requirements of being a persistent objector has not been met.

[7] *Barcelona Traction, Light and Power Co. Case* (Belgium v. Spain) (Second Phase) (*Barcelona Traction Case*) [1970] I.C.J. Reps. 3, at para. 33, or a rule of *jus cogens*.

[8] *Asylum case* (Colombia v. Peru) [1950] I.C.J. Reps. 266; *North Sea Continental Shelf case* (FRG v. Denmark; FRG v. The Netherlands) [1969] I.C.J. Reps. 3, at para. 77.

international law may permit a variety of measures not provided in the treaty. For example, whilst countermeasures are provided for under the general framework of the World Trade Organization,[9] the application of these measures are regulated by procedural requirements.[10] On the other hand, if Articles 30, and 47 to 50 of these draft articles were to be accepted as customary international law,[11] the requirements necessary to the taking of legitimate countermeasures would be far less regulated. It is contentious whether World Trade Organization dispute settlement procedures would preclude the taking of unilateral countermeasures as envisaged by the draft articles.[12] The problem arises in determining in what situations customary international law measures would be more appropriate over treaty measures.

9. Under Article 40(2)(e), a State is "an injured State" where either a multilateral treaty or a norm of customary international law has been violated. What happens when an overlap occurs? In the *Nicaragua case*, the Court in determining the provisions that allow human rights protection concluded that, "where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves".[13] This effectively places the governance of compliance of human rights provisions covered by conventions under the purview of convention organs, which in that case were the mechanisms under the Organization of American States Convention on Human Rights (Pact of San José) and its contemporary application. The general principle seems to be that where a convention has mechanisms for reacting against violations, then those mechanisms take priority. Thus for example, any action concerning the provisions of the Convention on the Elimination of All Forms of Racial Discrimination may have to be overseen by the Committee on the Elimination of Racial Discrimination, as Part II of the Convention delegates supervision and enforcement of the provisions to the Committee.

10. The situation with regard to customary international law would not be the same. Where the claim is purely based in customary international law, then the State will have to prove the existence of the norm in customary international law and establish that the violation of that norm has the consequences of obligations owed *erga omnes*, to the community of States. This requirement is recognized by the Commission. Clearly not all "rights", the violation of which, would give rise to all States being "an injured State". In the *Barcelona Traction case*,[14] the Court found, *obiter*, that some obligations are owed to the international community because of "... the importance of the rights involved ...".[15] The Court suggested that these rights were so important that all States had a "legal interest" in their protection.[16] The Court identified such norms as the outlawing of acts of aggression, genocide, and other

[9] Understanding on Rules and Procedures Governing the Settlement of Disputes (1994).

[10] For example, Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes requires the lapsing of a reasonable time for compliance before concessions may be suspended.

[11] The provisions on countermeasures were at the very least accepted as conditions to be considered in evaluating justifiable countermeasures. *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgement of 25 September 1997, at para. 33.

[12] Sornarajah, M., "WTO Dispute Settlement Mechanisms: An ASEAN Perspective", in Chia, S. Y. and Tan, Joseph L. H. (eds.), *ASEAN in the WTO: Challenges and Responses* (Institute of Southeast Asian Studies, ASEAN Secretariat, 1996), 111, at 122-124, particularly with regard to the application by the United States of the "super 301".

[13] *Nicaragua case* [1986] I.C.J. Reps. 134, para. 267.

[14] [1970] I.C.J. Reps. 14.

[15] *Barcelona Traction, Light and Power Co. Case* (Belgium v. Spain) (Second Phase) (*Barcelona Traction case*) [1970] I.C.J. Reps. 3, at para. 33.

[16] Ibid.

basic rights of the human person which include protection from slavery and racial discrimination.[17] The Court went on to say that "... on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality".[18] Thus concluding that the means of protection where obligations owned *erga omnes* were alleged to be violated, was on the regional level based on the mechanisms under such conventions.[19] To a certain extent, both the *Nicaragua case* and *Barcelona Traction case* provide dicta that places treaty measures over customary international law (at least in the sphere of human rights).

11. The Commission could perhaps investigate these issues with regard to clarifying whether in fact convention mechanisms should take priority over customary international law. The Commission may wish, in light of the above comments, further to consider the desirability of drafting separate provisions dealing with the two sources of international law within distinctly separate provisions rather than combining them as is the case now under Article 40. It may be, that the issue of which rights supersede, or which protection mechanism to apply, depends by and large on the circumstances and the discretion of the right-holder. Unless the convention specifically overrides customary international law provisions, the choice of mechanism may well remain within the discretion of the right-holder. Is this the situation *lex lata* or *de lega ferenda*?

C. Countermeasures

12. We agree with the general view that the right of States to take countermeasures in response to unlawful acts is permissible under customary international law. However, like some members of the Commission, we also question the desirability of providing a legal regime for countermeasures within the framework of State responsibility because of the potentially negative implications. Without prejudice to this position, we will nevertheless state certain observations on countermeasures.

13. Articles 48 and 50 prescribe some conditions limiting the type of measures that may be taken, but it does not address the key issue of whether the measures taken should be related or have some nexus to the right infringed. In fact, Article 50 would, in general, seem not to reflect State practice or customary international law. These are complex issues, the substance of which may perhaps be more appropriately addressed in a specialist forum rather than as part of the ongoing work on these draft articles.

14. The application of countermeasures permits an injured State to depart from the obligations that would normally bind it and commit what would otherwise be an internationally wrongful act. Article 30 precludes this act from being wrongful where it is legitimately taken in response to an internationally wrongful act committed against it by another State. Although the commentaries elaborate by emphasizing that such measures must be legitimately taken "in accordance with the conditions laid down in international law",[20] there are apparent contradictions in the commentaries concerning the conditions under international law. On the one hand, the Commission states that the object of countermeasures would be "... by definition, to inflict punishment or to secure performance",[21] whilst also

[17] Ibid., at para. 35.
[18] Ibid., at para. 91.
[19] Ibid.
[20] Para. 2, Commentary to Article 30.
[21] Para. 3, Commentary to Article 30.

stating that to apply countermeasures in excess of its lawful function or aims would make the act unlawful, particularly if the purpose was to inflict punishment.[22]

15. The application and impact of economic sanctions as countermeasures is inevitably dependent on the economic and political status of the injured and wrongdoing State. This ability to impose and consequential impact is almost always unequal. An economically or politically more powerful State is bound to be in a better position to impose effective countermeasures than weaker States, especially developing and less developed States. Similarly, the impact of countermeasures against weaker States will generally be far more detrimental than for more powerful States. The use of countermeasures would thus favour more powerful States and would potentially undermine any system based on equality and justice.

16. There should be little contention that economic sanctions do adversely affect the economic situation within a State. It may be ironic that the violation of a State of its international obligations would have the consequence of causing suffering to its population, who may incidentally already be suffering from a repressive regime. Eventually, the impact of economic sanctions will be experienced by innocent citizens who are imputed with the wrong for which they may not be themselves responsible.

17. The application of countermeasures must not adversely affect the rights of third States. Although the rights of third States and the wrongfulness of action affecting third States is preserved by Article 47(3), it may not go far enough to impose the necessary deterrence to the application of disproportionate or unfair measures. Concern for this has been expressed by the Commission as "by no means a theoretical case" and they highlighted situations where countermeasures were aimed directly and deliberately at innocent third States.[23] The draft articles may need to address concerns on abuses against and contingencies for innocent third States.

Concluding remarks

18. There is no doubt that these draft articles and accompanying commentaries are important to the development of State responsibility. However, it is clearly necessary to reaffirm that any obligations, the violation of which is alleged, must be firmly established in international law. The rule must be shown to be accepted with certainty by the international community. Judicial acceptance of submissions that there could be obligations owed to the wider community in such a manner that other States may have an interest, was discussed in the *Namibia (South West Africa) case*.[24] In that case, the Court was of the view that a violation of international law had to precede the claiming of an interest.[25] Thus the process in which the status as an injured State is bestowed must be clarified, not only because it modifies the relationship between States, but also because it precedes the taking of unlawful acts that are legitimate countermeasures and circumstances precluding wrongfulness.

[22] Para. 2, Commentary to Article 47.

[23] Para. 17, Commentary to Article 30.

[24] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (1971) I.C.J. Reps. 16 (Advisory Opinion of 21 June 1971).

[25] Yearbook of the International Court of Justice, 1970-1971, No. 25, at 107.

19. We are not convinced that these draft articles should take the form of an international convention. As other States have noted, to adopt the form of a convention may create unnecessarily rigid rules. The principles formulated by the Commission should permit flexibility for international tribunals and States in its application to particular scenarios. We therefore reserve the right to make further observations and comments to these draft articles should the need arise.

20. Once again, we would compliment the Commission on its efforts in producing these draft articles and commentaries on State responsibility. We wish the Commission every success in its endeavours.

Prepared by
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10 June 1998